Supreme Court, U.S.
FILED
00-835 JUL 12 2000
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States

KEVIN MORSE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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28pp

QUESTIONS PRESENTED

1. Whether the Grand Jury Venire was improperly impaneled?

2. Whether the Sentence was erroneously calculated?

3. Whether there is a lack of jurisdiction due to defects in the indictment?

4. Whether the District Court impermissibly allowed the admission of hearsay testimony?

5. Whether the Court improperly denied the Appellant's post-trial motions per Rule 29 and 33?

6. Whether the Government improperly introduced a separate constructive amendment along with inadmissible hearsay and other evidence improperly gathered along with improper conclusions of fact and law to convict the Defendant on improper evidence and insufficient evidence?

7. Whether the Court improperly denied the Appellant's motion to dismiss per Rule 29 for insufficient evidence and improperly permitted prosecutorial misconduct and cross-examination in violation of FRE 608?

8. Whether there was improper influence placed on the Grand jury due to admission of evidence of crimes not associated with the Appellant?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner is Kevin Morse. He is an individual with no corporate affiliations.

Respondent

The United States of America.

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The Petitioner, Kevin Morse, respectfully prays that a Writ of Certiorari be issued to review the judgement and opinion of the United States Court of Appeals for the Eighth Circuit, which affirmed the Petitioner's conviction April 14, 2000.

OPINION BELOW

The opinion of Court of Appeals for the Eighth Circuit was entered on April 14, 2000, under the caption United States v. Morse. The decision is attached hereto as Exhibit A.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 14, 2000. This Petition for Writ of Certiorari has been filed and docketed within the time limits prescribed. The jurisdiction of this Court is properly invoked.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part that "no person shall be deprived of life, liberty, without due process of law."

The Sixteenth Amendment does not provide for the imposition of tax laws as implicated by this conviction.

STATEMENT OF THE CASE

The Petitioner, Kevin Morse, is an independent contractor engaged in the occupation of farming. In an Indictment returned by a grand jury sitting in the District of Minnesota, on or about April 8, 1998, the Petitioner was charged with a four Count Indictment of violations of §7206(1) of Title 26 of the United States Code. He was accused of filing false tax returns for the years 1991, 1992, 1993, and 1994. The Petitioner was accused of falsely stating his total income or failing to report additional income.

On April 8, 1998, a warrant was issued for the arrest of Kevin Morse. On April 9, 1998, the Petitioner voluntarily appeared and bond was set. On April 16, 1998, the Petitioner was arraigned and a not guilty plea was entered as to all four counts. A variety of pre-trial motions addressing defects in the Indictment, jurisdiction, suppression of evidence, and discovery were filed. Except for some discovery motions, all motions were denied. A motion was filed attacking the constitutionality of the Grand Jury venire. After the trial, the Court denied the motion.

On November 10, 1998 the Petitioner's trial commenced. On November 23, 1998, the trial concluded and the jury returned a verdict of guilty in all four counts as to the Petitioner.

On June 16, 1999, the Petitioner appeared for sentencing where the Court imposed a sentence of 18 months with supervised release for one year in addition to a special assessment of $200.00, restitution of $61,700.00, and a fine of $10,000.00. The Appellant was permitted voluntary surrender to a designated institution on August 2, 1999.

The Petitioner timely filed a Notice of Appeal after the denial of motions per Rules 29, 30 and 34. This appeal and all issues as addressed herein were denied on April 14, 2000. The Petitioner has paid all fines and costs in this matter.

REASONS FOR GRANTING THE WRIT

The Petitioner would submit that his convictions are not supported by the evidence. Furthermore the vague and undefined nature of the Federal Income tax code makes it impossible for the Petitioner to comply with those statutes. The District Court in an effort to support these vague and unconstitutional laws violated numerous evidentiary and procedural rules thus denying the Petitioner due process of law.

ARGUMENT

I. The Grand Jury Venire was improperly impaneled.

The Petitioner submits that this issue properly addresses significant errors which result in the denial of racial equity in the jury selection system in Minnesota. These errors denied the Petitioner a jury comprised of a fair cross section of his peers. By dismissing the instant petition the Panel has elected to focus on its disdain for tax-related jurisdictional issues while ignoring important constitutional rights.

The Petitioner would first submit that he has been denied due process of law due to the convening of an improperly selected Grand Jury venire. The Grand Jury panel in this case was selected in violation of Minnesota procedures for selecting Grand Juries, was constituted of entirely non-minority individuals, and was part of a series of systematic

exclusions of individuals from the Eighth District, the district which contained the largest proportion of native American individuals.

As part of the Petitioner's challenge to the Grand Jury impanelment, the Petitioner commissioned a statistical study of the racial composition of the assorted districts from which the Grand Jury was to be comprised. The statistical study, Exhibit F, at trial, clearly demonstrated that the Petitioner was denied diffused impartiality among the jurors as required by Taylor v. Louisiana, 491 U.S. 522, 530 (1975); Peters v. Kiff, 407 U.S. 493, 500 (fn. 9); and Ballew v. Georgia, 435 U.S. 223, 233-234 (1978), and that the Grand Jury selection process systematically excluded minorities, especially native Americans by not including appropriate representation from the Eighth Division of Minnesota. United States v. Ireland, 62 F.3d 227 (8th Cir. 1995).

In the pre-trial proceeding of 11/9/98 the trial court acknowledged the unconstitutional deviation from the selective process of Minnesota's own standard at transcript of 11/9/98 at page 7 (lines 11 to 23)(Emphasis added) the Court said:

> "THE COURT: Well, the second problem involved the issue of whether the names that were drawn for the grand jury panel each time were drawn from the state source list, which is what we typically draw from, or were they drawn simply from the voter registration list.
>
> It appears to me that throughout, at least recent memory of the Clerk's Office, they have drawn the names for the grand jury from the voter registration list, and not from the

state source list, which would add drivers license and state I.D. card lists of people.

It apparently was supposed to have been done. The list broadened in 1992, like they were for the petit jury list. **But this was not done, apparently.**"

The result of this Grand Jury selection process was the impanelment of a Grand Jury which excluded minorities, by in effect excluding the population of the Eighth Division.

II. The Sentence was erroneously calculated.

The Panel next erred by not considering the calculated offense level of the Petitioner, which included uncharged and unrelated conduct. The base offense level was calculated by including the amount of taxes owed for FICA and FUTA. As a self-employed individual, the Petitioner is specifically excluded from paying these taxes.

It is well established law that tax liability under FICA, FUTA, and the self-employment tax does not extend to individuals who are employed as independent contractors or are self-employed. In fact these individuals are expressly exempt from this tax burden. United States v. Mutual Trucking Co., 141 F.2d 655, 658 (6th Cir. 1944); Glenn v. Standard Oil Co., 148 F.2d 51 (6th Cir. 1945); United States v. William Webb, Inc., 397 U.S. 179. Additionally, the Code of Federal Regulations specifically exclude private Independent Contractors from the liability associated with FICA, FUTA or self-employment tax. See generally, 26 CFR 31.3121(d), 20 CFR 410.110, 26 CFR 31.3306(I), 21 CFR 31.3401(c).

Therefore, for purposes of sentencing, the computation of the tax liability must not include taxes which were not owed by the Petitioner.

III. There is a lack of jurisdiction due to defects in the indictment.

Claims regarding a court's jurisdiction are never waived and must be heard at any time raised. Therefore the Petitioner would request that this Court address the issues contained in this issue. It was error for the Court to deny all the Petitioner's motions to dismiss based upon lack of jurisdiction and due to a defective Indictment.[1]

The Indictment in Counts 1 through 4 states in conclusory language that the Petitioner had a tax obligation to report income under oath, that was not included in a non-specific "U.S. Individual Income Tax Return" for the given years. The Indictment failed to state what was the specific underlying tax statute/regulation per the Origination Clause Art 1, §7(1)[2] that compelled the Petitioner to report something not identified as a taxable event in the Indictment which, amounted to income required to be reported. The Indictment in Counts 1-4 also fails to identify the Petitioner as a taxpayer per 26 USC §7701(a)(14),subject to "any Internal Revenue Tax", Anderson v. U.S. 11 F.2d 938 (1928) and obligated to pay a tax recognized by Art. I §7(1) in Title 26. The Indictment uses the words "material matter", "income" or "total income" or "additional income" without giving notice

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[1] Docket entries 18, 41, 47, 107, 108 and 119.

[2] Patterson v. McClean Credit Union (1989) 109 S.Ct 2363, Central Bank, N.A. v. First Interstate Bank, N.A. (1994) 114 S.Ct 1439.

of the specific tax statute per Art. I §7(1), or regulation per 26 USC §7801 and 7805[3] which advises the grand jurors, the

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[3] These factors and anomalies are important in requesting a dismissal because the Supreme Court has noted, in describing the relationship between the Secretary of Treasury, the U.S. Code and the Code of Federal Regulations (CFR).

> ". . . we think it important to note that the Act's civil and criminal penalties **attached only upon violation of regulations promulgated by the Secretary.** If the Secretary were to do nothing the Act itself would impose no penalties upon anyone."

California Bankers Association vs. Schultz 416 U.S. 21, 26, 94 S.Ct. 1494, 1500, 39 Led. 2d. 872 (1974).

> This jurisdictional decision by the Court is understandable in light of the jurisdictional scope of Title 26 in §§7801, 7805
>
> **26USC §7801. Authority of Department of Treasury.**
> **(a) Powers and duties of Secretary.**
> Except as otherwise expressly provided by law, the administration and enforcement of this Title shall be performed by or under the supervision of the Secretary of Treasury.
>
> **26 USC §7805. Rules and Regulations.**
> **(a) Authorization.**
> Except where such authority is expressly given by this Title to any person other than an officer or employee of the Treasury Department, **the Secretary shall prescribe all needful rules and regulations for the enforcement of this Title,**

Petit jurors and the Petitioner of what those terms specifically mean when placed in a criminal Indictment charging criminal responsibility.

> §7206 (1) states the offense as "Any person who - "Willfully make and subscribe any return, statement or other document which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter:"

Further, the Indictment violates due process as the Indictment and the statue noted in the Indictment fails to give fair notice as to what constitutes the illegal conduct so that the Petitioner would have had notice of his obligation to conform his conduct to the requisites of law. U.S. v. Batchelder, 422 U.S. 114, 123. The Indictment failed to comply with §6001 of Title 26[4] - no notice of an obligation.

> **including all rules and regulations** as may be necessary by reason of any alternation of law in relations to internal revenue.

[4] Sec. 6001 NOTICE OR REGULATIONS REQUIRING RECORDS, STATEMENTS, AND SPECIAL MATTERS - reprinted in appendix. See also U.S. vs. Mobil Corp. 543 F.Supp 507,513 (1981). "The first codification of the Internal Revenue laws appeared in 1939... The exception was that the record and return provision required taxpayers to make returns and statements and keep records **where the Commissioner served notice on them, but it did not require them to perform these acts in the absence of notice by the Commissioner...** When it enacted §6001 as part of the 1954 Code, Congress eliminated the 1939 Codes record and return provisions which related to specific types of tax

The Indictment is defective because it assumes that §7206(1) contains a non-existent statutory presumption of taxability or the Petitioner's knowledge of his taxability.[5] It presumes taxability and presumes the taxpayer's knowledge of taxability which is contrary to law, U.S. v. Alt 966 F.2d 827,828,829 (6th Circ. 1993). See also Sandstrom v. Montana, 442 U.S. 510 (1979).

The sum problem with the Indictment in all four Counts per Rule 7(c) is that it failed to "state for each Count the official or customary citation of the statute, rule, regulation, or other provision of law which the Petitioner is alleged to have violated", U.S. v. Levy 533 F.2d 969 (5th Cir. 1976). The Petitioners specific argument to each error in the indictment was set forth in the Petitioner's brief.

The issue stated precisely is whether or not the Government/IRS can seek the jurisdiction of the Federal District Court to enforce criminal sanctions pursuant to § 7206(1) when the indictment language is deficient and fails to conform to the requisites of Art. 1, Sec. 7(1) and Art. 1, Sec. 8(1) when it fails to state a specific income tax statute, regulation or law authorized by Congress per Rule 7(c) that

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liability and combined the requirement that taxpayers keep certain types of records and make returns and statements **with the requirement that they perform these acts upon notice by the Commissioner.** §6001 was included in the 'Records, Statements, and Special Returns' portion of the subtitle of the Code concerning 'Procedure and Administration,' which suggests that Congress did not intend for §6001 to serve as an authorization to inspect records."

[5] Statutory presumptions, actual or not, are not favored at law as they are irrational and arbitrary. See appendix A.

gave notice of a specific tax obligation concerning an excise tax that conforms to the rule of law of Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1916); particularly when the language of this indictment does not conform to the law of the 8th Circuit as noted in United States v. Ballard, 535 F.2d 400 (8th Cir. 1976).[6] It must be remembered that given the fact that income has not been defined by congress, Ballard, supra, the jurisdiction for criminal enforcement is not available for the reason that a criminal prosecution for the violation of an unclear, unknown duty violates "the clear, Constitutional duty of the Government to warn citizens whether particular conduct is legal or illegal." United States v. Critzer, 498 F.2d 1160-62 (4th Cir. 1974).

IV. The District Court impermissibly allowed the admission of hearsay testimony.

Again, the Petitioner addressed to this Court, evidentiary matters of extreme importance. These errors in effect denied the Petitioner of any opportunity to present an effective defense or due process of law.

At trial, the Government offered the testimony of numerous witnesses who all testified regarding either events to which they had no direct personal knowledge, or their knowledge was premised solely on computer generated summaries where the underlying facts were not admitted as evidence. MRE 602, 104.

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[6] "Understanding the term in this natural and obvious, it cannot be said that a conversion of capital assets invariably produces income. ... The general term "income" is not defined in the Internal Revenue Code." Ballard at 404-05.

Records recently prepared for litigation are not admissible. Palmer v. Hoffman, 318 U.S. 109 (1943). Ms. Buffalow and Mr. Sandven clearly testified that the records were prepared specifically for the Petitioner's trial. Computer information recently prepared for litigation is not admissible. See also Hartzog v. U.S., 217 F.2d 706, 710 (4th Cir. 1954), Scheerer v. Hardee's, 92 F.3d 702, 705 (8th Cir. 1996). In Scheerer, this Court concisely stated that documents prepared in anticipation of litigation and without evidence of the underlying facts which comprise the document **are not admissible!** At 706-07. The remaining witness had no personal knowledge that was of any benefit to the determination of ownership of the grain reaccepts as required by F.R.E. 803(8).

The testimony of these witness was clearly in violation of the evidentiary rules for the admission of hearsay testimony. As such the Court clearly abused its discretion in admitting each of the witness statements as evidence. The total error warrants a reversal of the Petitioner's conviction in this matter. Therefore the Petitioner would respectfully request that this Court review this matter and issue an opinion accordingly.

V. The Court improperly denied the Petitioner's post-trial motions per Rule 29 and 33.

The AUSA likewise introduced another variance from charges noted in the Indictment. At Tr. 469 through 472 the AUSA induces Agent Schad to **say that the Petitioner had received earnings subject to Social Security Taxes although there was not proof to that effect**, but more importantly there **was no notice given in the Indictment** of the same and therefore the accusation of the same is also a variance or a

constructive amendment which is impermissible. Kotteakos v. United States, 368 U.S. 750 (1946).

This error by the Court and the AUSA was compounded by the Court at Tr. 481 and 482; when the Court allowed the AUSA to introduce hearsay referencing a document to support another claim for illegality on the part of the Petitioner. The Panel elected to not address the merits of this issue in its opinion. Again, the Petitioner would submit that this issue severely impacted his right to a fair trial. Absent a specific opinion by this Court, the Petitioner's availability for relief with the Supreme Court is similarly hampered.

VI. The Government improperly introduced a separate constructive amendment along with inadmissible hearsay and other evidence improperly gathered along with improper conclusions of fact and law to convict the Petitioner on improper evidence and insufficient evidence.

The Petitioner alleges serious errors in the presentation of factual evidence at his trial. These errors should be reviewed on their merits. The Petitioner would respectfully request that this Court reconsider its decision to affirm this conviction absent a thorough a review of the factual record.

Witness Gary Mentz was an IRS Agent from the Civil Audit Division. He examined the Petitioner and his tax forms for the years 1991 to 1994. Likewise, Gary Mentz took information gathered by the summons pursuant to §7603 via Agent Schad and compared cash flow charts, (Govt. Exhibits 25 and 26). Agent Mentz then testified as to definitions of law contrary to the Internal Revenue Code and the law of Ballard, supra.

The Petitioner submits that the information gathered by the use of the summons power pursuant to §7602 of the IRC should have been suppressed for the reason that §7608 of the IRC does not permit IRS Agents to become the authors or originators of a summons which is a judicial function or a function emanating from the courts. Again, §7608 allows the IRS Agents to serve a summons but it does not authorize them to authorize a summons.[7]

VII. The Court improperly denied the Petitioner's motion to dismiss per Rule 29 for insufficient evidence and improperly permitted prosecutorial misconduct and cross-examination in violation of FRE 608.

At trial, the Court failed to dismiss the instant charges even after the Government offered no proof of an actual calculation of net income. The IRS Agents and all witnesses testified that the receipts from the grain were not all profit as there were substantial costs associated with producing this product. Further, The IRS Agents admit that the exact costs could not be calculated and therefore the existence of income could not be proven; nor did the Government/IRS know the source of the grain/income.

Additionally, the Prosecutor appealed to the self-interest or prejudices of the jurors as they jurors are taxpayers. Essentially, the Government said that the Petitioner was cheating the jurors on the basis that the jurors are good people who paid their taxes and the Petitioner was a bad person who did not pay taxes and deserved to be convicted. This tactic is fundamentally unfair. The Court

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[7] Docket entry 25,46,47.

gave no corrective instruction when the argument was objected to by Defense counsel. This improper tactic of the AUSA was so fundamentally unfair that it denied the Petitioner his right to a fair trial and, therefore, it violated the principle of fundamental fairness, U.S. v. Pierce 62 F.3d 818 (CA 6, 1995).

These errors significantly impacted the Petitioner's right to due process of law and a fair trial. The Petitioner would respectfully request that this Court review these constitutional errors and vacate the convictions against him.

VIII. There was improper influence placed on the Grand jury due to admission of evidence of crimes not associated with the Petitioner.

The Petitioner is also entitled to a reversal of conviction due to the fact that at the Petitioner's Grand Jury, the Government introduced evidence of the guilt of the Petitioner's brother, notwithstanding the fact that they were not charged in the same Indictment as co-conspirators or in aiding or abetting one another or even as unindicted co-conspirators.

This was also a violation of the Petitioner's Fifth Amendment right to due process of law and his Eighth Amendment right to confrontation. It would seem fundamental to the Petitioner that one person cannot be found guilty by evidence of another person's guilt, absent a conspiracy or some type of joint activity, which makes the Petitioner culpable. If this were not so, it would violate the rule that guilt of a crime must be personal, Scales v. U.S. (1961) 367 U.S. 203. Likewise, it violates the fundamental principle of law that a Petitioner cannot be convicted on the basis of a theory presented to the Grand Jury and not

presented to the trial jury, U.S. v. Russell (1962) 369 U.S 749.

CONCLUSION

In conclusion, the claims raised in this petition present a substantial constitutional question which should be heard by the United States Supreme Court. Accordingly, this Court should grant certiorari in this case.

Respectfully submitted,

/s/_____

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APPENDIX A

[UNPUBLISHED]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Filed April 13, 2000]

No. 99-2771

United States of America,	)
Appellee,	)
	)
v.	)
	)
Kevin J. Morse,	)
Appellant.	)
	)

Appeal from the United States District Court
for the District of Minnesota

Submitted: March 14. 2000

Before RICHARD S. ARNOLD, and BEAM, Circuit Judges, and CONMY,[1] District Judge.

[1] The Honorable Patrick A. Conmy, United States District Judge for the District of North Dakota.

OPINION

PER CURIAM.

Kevin J. Morse appeals his conviction on four counts of willfully filing a false tax return in violation of 26 U.S.C. § 7206(1). Morse presents a superfluity of contentions, including: (1) his grand jury was improperly selected; (2) the government improperly influenced the grand jury by presenting evidence of crimes perpetrated by his brother; (3) the indictment provided insufficient notice of the charges and was insufficient to establish the jurisdiction of the district court:[2] (4) the district court erred in denying a motion to suppress government evidence; (5) the district court erroneously admitted hearsay testimony from government witnesses; (6) the government used improper impeachment evidence against Morse's expert witness; (7) the district court erred in not dismissing the charges because the government constructively amended the indictment during trial; (8) the government made an improper closing argument: (9) the district court erred in denying his motions for judgment of acquittal and a new trial; (10) the district court erroneously calculated the base offense level for his sentence; and (11) the district court erroneously ordered restitution. After reviewing the parties' submissions and the record, we find these arguments are meritless, and we affirm the conviction and sentence.[3] See 8th Cir. R. 47B.

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[2] The Honorable John R. Tunheim, United States District Judge for the District of Minnesota.

[3] We grant Morse's motion to file a reply brief out of time.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

US Court of Appeals for the Eighth Circuit
Case Summary

Court of Appeals Docket #: 99-2771 Filed: 6/28/99
United States v. Kevin J. Morse
criminal - both conv. & sent. - none PRO SE
Appeal from: U.S. DISTRICT COURT, MINNESOTA

Lower court information:
District: 0864-3 : CR 98-94 JRT/RLE
Trial Judge: John R. Tunheim, U.S. District Judge

1/18/00	*SET FOR ARGUMENT* - March in St. Paul. [99-2771] (tab)
3/2/00	ARGUMENT STATUS CHANGED from arg to no-arg status per memo of 3/2/00. (kms)
3/14/00	SUBMITTED ON THE BRIEFS WITHOUT ORAL ARGUMENT TO Judges Richard S. Arnold, Circuit Judge, C. A. Beam, Circuit Judge, Patrick A. Conmy, Visiting Judge in ST. PAUL [99-2771] (jmb)
3/16/00	MOTION of aplnt, Kevin J. Morse, to file brief out of time [99-2771] [1245133] w/service 3/15/00 (dla)
3/16/00	BRIEF TENDERED - Reply brief - Kevin J. Morse 13 pgs - 5 copies - w/service 3/15/00

	Defects: not enough copies, no disk [99-2771] (dla)
4/13/00	THE COURT: Richard S. Arnold, C. A. Beam, Patrick A. Conmy PER CURIAM OPINION FILED: UNPUBLISHED [99-2771] [1255624] (dms)
4/13/00	JUDGMENT: Richard S. Arnold, C. A. Beam, Patrick A. Conmy : The judgment of the lower court is AFFIRMED in accordance with the opinion. [99-2771] [1255638] (dms)
4/27/00	MOTION of aplnt, Kevin J. Morse, for extension of time to file petition for rehearing by the panel until 5/4/00 [99-2771] [1261138] w/service (mam)
4/27/00	ORDER filed: granting appellant motion extend petition for rehearing time [1261138-1] [99-2771] [1261141] Petition for Rehearing due on 5/4/00 (mam)
5/5/00	RECEIVED UNTIMELY Petition for rehearing by the panel, filed by Appellant Kevin J. Morse w/service 5/4/00, TO COURT. [99-2771] (mam)
6/8/00	JUDGE ORDER: denying untimely petition for panel rehearing [1264511-1] filed by Kevin J. Morse [99-2771] [1276561] (mam)

[END OF DOCKET: 99-2771]